Circuit Court for Baltimore City
Case No. T14153008

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1256

September Term, 2016

In re: Adoption/Guardianship of J.D.

Arthur,
Reed,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: February 17, 2017

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Jeremy D., appellant, is the father of the minor child, J.D. Both of J.D.'s parents were living in drug treatment programs when he was born. J.D. has lived with his maternal great-aunt and uncle his entire life. In June 2014, the Baltimore City Department of Social Services ("the Department") filed a petition for guardianship in the Circuit Court for Baltimore City. Mother was served with the petition and consented by not objecting. Although the Department arranged to personally serve appellant numerous times, he failed to show up each time. As a result, the court granted the Department's request for service by publication and posting. Father did not object after being served by publication and posting. In January 2015, the court granted the guardianship petition. J.D. was adopted by his great-aunt and uncle in May of 2015. In April 2016, appellant filed a petition to invalidate the adoption and guardianship order, arguing fraud and irregularity by the Department for not being exhaustive enough in its efforts to serve him. After a hearing, the court denied appellant's motion.

Appellant appealed, and now presents one question for our review:

> Did the court abuse its discretion when it denied appellant's motion to revise?[1]

For the following reasons, we answer no and affirm the judgment of the juvenile court.

[1] The question as presented in appellant's brief is as follows: "Was it error or an abuse of discretion to deny the petition to invalidate the adoption and re-open the adoption and guardianship case?"

BACKGROUND

J.D. was born on May 1, 2013. At the time of his birth, his parents, appellant and Ms. N. ("Mother"), were abusing illegal drugs and residing in residential drug treatment programs. On May 9, 2013, J.D. was placed in the custody of the Department. The next day, the Department placed him in shelter care with his maternal great-aunt and uncle, Mr. and Mrs. R. J.D. has lived with Mr. and Mrs. R. for his entire life. On June 15, 2013, the juvenile court found J.D. to be a Child in Need of Assistance ("CINA") and awarded custody to the Department.[2] On March 24, 2014, the court changed his permanency plan to relative adoption.

On June 6, 2014, the Department filed a petition for guardianship. Mother was served with the petition on June 23, 2014. She did not object, and therefore was deemed to have consented. Counsel for J.D. initially objected, but withdrew his objection on January 7, 2015, and consented to guardianship by Mr. and Mrs. R.

Locating appellant regarding this matter proved to be much more difficult for the Department. The Department made several attempts to serve appellant with the petition for guardianship and the show cause order. On June 6, 2014, the petition and show cause order were sent to an address for appellant by certified mail. The address was listed as

[2] A "Child in need of assistance" means a child who requires court intervention because the child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and the child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs. Md. Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 3-801(f).

appellant's address in the Maryland District Court. The mail receipt was returned unsigned. On June 15, 2014, Daniel Calhoun, an investigator for the Department, spoke with appellant on the phone about arranging a meeting. Appellant told Mr. Calhoun that he would call back the next day, but failed to do so. On June 24, 2014, appellant called Denise Wallace, a legal assistant for the Department. Appellant requested to meet in the lobby of 100 S. Charles Street to receive the petition and show cause order. Ms. Wallace waited for twenty minutes at the location, but appellant never showed up. Appellant later informed the Department that he was afraid of being arrested if he came into the building. On June 25, 2014, appellant called Ms. Wallace again and told her that he would meet her in the lobby the next day between 2:00 and 3:00. Again, appellant failed to show up at the specified time and place. On June 30, 2014, Ms. Wallace made contact with appellant again. Appellant informed her that he would call her when he was on his way to the building. Once again, appellant did not show up and did not call. On July 7, 2014, Ms. Wallace attempted service by certified mail to two different addresses obtained from the CARES system and the Maryland District Court. Both attempted mailings were unsuccessful. On July 15, 2014, Mr. Calhoun unsuccessfully attempted personal service at appellant's listed address. When Mr. Calhoun contacted appellant by phone, appellant told him that he no longer lived at that address. On August 12, 2014, Investigator David Neverdon attempted to serve appellant at a court hearing in Annapolis, but appellant failed to show up for the hearing.

On October 9, 2014, the Department filed a motion to permit service of the guardianship petition on appellant by publication and posting. Ms. Wallace submitted an affidavit detailing the above described efforts made by the Department to locate and serve appellant. The court granted the motion on October 14, 2014. Appellant was served by publication and posting, and did not file an objection to the petition. Appellant's failure to object was treated as consent to the petition. *See* Md. Code (1984, 2012, Repl. Vol.), Family Law Article ("FL"), 5-320(a)(1)(iii)(C).

On January 7, 2015, the court granted the Department's petition for guardianship, terminating appellant's parental rights. On May 6, 2015, Mr. and Mrs. R. adopted J.D. On May 27, 2015, appellant filed an appeal of the January 7, 2015 order. On October 13, 2015, this Court dismissed the appeal.

On April 25, 2016, appellant filed a "Petition to Invalidate Adoption, Guardianship Order, Re-Open Adoption Case and Guardianship Case, Shorten Time to Respond and Request for Hearing." Appellant alleged fraud and irregularity by the Department and requested that the court re-open the case pursuant to its revisory powers under Rule 2-535. In essence, this was a motion to revise. Appellant alleged that he was never served because he was incarcerated during the relevant time period, and a good faith effort from the Department would have discovered his location. The court held a hearing on the motion on July 6, 2016. At the hearing, appellant testified that he was incarcerated from September 10 through October 2, 2014, and then again on October 14, 2014. Appellant testified that he did not recall speaking with Ms. Wallace or anyone

from the Department in 2014. The court explicitly stated that it did not find appellant's testimony to be credible. At the conclusion of the hearing, the court stated, "Well, I've given everyone my curbstone view of this, which is that there is not sufficient evidence of any fraud, mistake, or irregularity that would likely cause me to grant the motion." The court then announced that it would hold the matter *sub curia* for a period of seven days before issuing its ruling. On July 13, 2016, the court issued its order denying appellant's motion. In the order, the court stated:

> There is no found fraud, mistake or irregularity in the Court's finding of [the Department's] reasonable, but unsuccessful, efforts to serve [appellant] with the TPR Petition and show cause order in 2014. [Appellant's] multiple express agreements to meet the [Department] for service of the TPR papers and then inadequately explained failures to appear when and where [appellant] agreed to be, and failure to appear at a District Court hearing where service was again attempted, inter alia, far more than adequately support the Court's granting of the [Department's] motion for alternative service by publication and posting and resulting statutory consent to the granting of the TPR by [appellant] after [appellant] failed to object thereto, timely or otherwise. (App 9)

Appellant timely appealed the July 13, 2016 order.

DISCUSSION

I. Appellee Child's Motion to Dismiss

Along with his brief to this Court, child's counsel filed a motion to dismiss this appeal. Child's counsel contends that appellant's motion to revise, and this subsequent appeal, failed to satisfy the requirements of a Rule 2-535 motion. In particular, he argues that appellant failed to state with any specificity his allegations of fraud, mistake, and

irregularity. Additionally, child's counsel asserts that appellant has failed to establish that he acted with the requisite ordinary diligence and good faith.

Contrary to counsel's claims, appellant did identify what he alleged to be fraud and irregularity in this motion to revise. Appellant argued that the Department did not exercise good faith in its efforts to locate and serve him, and that this lack of a good faith effort constituted fraud and irregularity. Accordingly, we deny the motion to dismiss and will consider appellant's appeal on its merits.

II. Denial of Appellant's Motion to Revise

Appellant appeals from the denial of a motion to revise filed pursuant to Rule 2-535(b). "On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity." Md. Rule 2-535(b). "The denial of a motion to revise under Rule 2-535(b) is appealable, but the only issue before the appellate court is whether the trial court erred as a matter of law or abused its discretion in denying the motion." *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 475 (1997). For a court to grant a motion to revise, "[t]he existence of fraud, mistake, or irregularity must be shown by 'clear and convincing evidence.'" *Davis v. Attorney Gen.*, 187 Md. App. 110, 123 (2009).

Appellant contends that parental rights are of such importance, that the court must require the Department to go to more exhaustive lengths to locate him than it did. Appellant asserts that he was either incarcerated or homeless during this period; therefore, the Department knew that service by publication and posting would be

unsuccessful. Appellant also argues that due to his fear of being arrested, the Department should have arranged for personal service at a less intimidating location. In his motion to revise, appellant alleged that the Department's lack of effort to locate him constituted "fraud and irregularity."

In the case of fraud, we have stated that "courts may vacate an enrolled judgment for extrinsic, but not for intrinsic, fraud." *Das v. Das*, 133 Md. App. 1, 18 (2000). We explained that

> Fraud is extrinsic when it actually prevents an adversarial trial. In determining whether or not extrinsic fraud exists, the question is not whether the fraud operated to cause the trier of fact to reach an unjust conclusion, but whether the fraud prevented the actual dispute from being submitted to the fact finder at all.

Id. (quoting *Hresko v. Hresko*, 83 Md. App. 228, 232 (1990) (Internal quotation marks omitted).

In the instant case, we find no evidence of fraud that prevented the case from being submitted to the fact finder. The actions of the Department did not prevent appellant from learning of or participating in the proceeding. In fact, the exact opposite occurred. The evidence overwhelmingly shows that the Department made repeated attempts to locate appellant and serve him with both the petition and the show cause order. On no less than five occasions, appellant spoke directly with employees of the Department that were trying to contact him. These interactions repeatedly led to the parties arranging to meet, but each time appellant failed to show up and offered inadequate excuses for his absence. Appellant was clearly apprised of the situation

regarding the TPR petition. Appellant cannot willfully avoid service on several occasions and then contend that the Department failed to be exhaustive enough in its efforts. As the Department has argued, appellant "knew of this proceeding but chose to evade service, leaving the Department and the court no choice but to attempt service by publication."

Appellant also makes the argument that the Department should have arranged for a "less intimidating place" for personal service after he indicated that he was fearful of an arrest. Appellant cites to no statute or case law that imposes any such duty on the Department. Moreover, as child's counsel has pointed out, this argument directly contradicts appellant's testimony at the hearing that he never spoke with anyone from the Department. Therefore, we find no merit in this argument.

Furthermore, although appellant testified that he was never in contact with the Department, the juvenile court found that he was not credible. When assessing the credibility of witnesses, the court is "entitled to accept—or reject—*all, part,* or *none* of the testimony of any witness, whether that testimony was or was not contradicted or corroborated by any other evidence." *Omayaka v. Omayaka*, 417 Md. 643, 659 (2011). With regards to appellant's testimony at the hearing, the court stated on the record:

> [Q]uite frankly, my finding is I don't find the testimony that [appellant] had no conversations with [the Department] credible. And any judge or jury has to assess the witness, what is said, how it's said, the motive to say what is true or not true, and I just don't find it credible.

It was within the discretion granted to the court to make this determination. Moreover, it

was a reasonable conclusion given that appellant's testimony directly contradicted the affidavits of the Department employees who had been in contact with him several times. Accordingly, the court had sufficient cause to reject his claim of fraud.

On the issue of irregularity, we have defined it as follows:

> An irregularity is the doing or not doing of that, in the conduct of a suit at law, which, conformable to the practice of the court, ought or ought not to be done. Furthermore, an irregularity in the contemplation of Rule 2-535(b) is not an error, which in legal parlance, generally connotes a departure from truth or accuracy of which a [party] had notice and could have challenged, but a nonconformity of process or procedure. Courts, therefore, have held that if the judgment under attack was entered in conformity with the practice and procedures commonly used by the court that entered it, there is no irregularity justifying the exercise of revisory powers under Rule 2-535(b).

Pelletier v. Burson, 213 Md. App. 284, 290 (2013) (Internal citations and quotation marks omitted). The record in the case at bar presents no such evidence of any irregularity. As detailed above, the Department made numerous attempts to locate and serve appellant. When it became clear that those efforts were futile, the Department followed statutory procedure and filed a motion to serve by publication and posting.

FL § 5-316(d) requires guardianship orders and show cause petitions to be served on the parents at their listed address. FL § 5-316(e) states that if service cannot be accomplished under section (d), "the petitioner shall make a reasonable, good faith effort to identify an address for the parent and serve the parent at that address." As discussed *supra*, the Department made multiple unsuccessful attempts to serve appellant both personally and at his listed address. The Department's motion for publication and

posting was filed pursuant to FL § 5-316(f), which provides that "[i]f a juvenile court is satisfied, by affidavit or testimony, that a petitioner met the requirements of subsection (d) and, if applicable, subsection (e) of this section but could not effect service on a parent, the juvenile court shall order service through notice by publication as to that parent." The Department's motion included the affidavit from Ms. Wallace detailing the efforts that the Department exerted in trying to locate and serve appellant. Based on this evidence, the court found good cause to grant the request and appellant was served by publication and posting. The Department followed the statutes as required, and we do not see any aspect of this as constituting "noncomformity of process or procedure." Therefore, we find no case of irregularity. With no evidence of fraud or irregularity, there was no error in the court's denial of appellant's motion.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.